Supreme Court of the United States.

ILLINOIS C. R. R. CO. ET AL. v. BOSWORTH ET AL.

The confiscation of a person's real estate, as enemy property, by proceedings *in rem*, under the Statute of July 17, 1862, puts the fee in abeyance—*in nubibus;* but if the former owner be pardoned as a personal offender, the fee revests in him.

Proceedings *in rem*, against enemy property, are personal, and for the punishment of offenders guilty of treason and rebellion.

In error to the Circuit Court of the United States for the Eastern District of Louisiana.

James Fentress, Thomas J. Semmes, and *Girault Farrar,* for plaintiffs in error.

E. H. Farrar and *E. B. Kruttschnitt,* for defendants in error.

BRADLEY, J., January 20, 1890. This was an action brought by Millard Bosworth and Charles H. Bosworth, only surviving children of A. W. Bosworth, deceased, to recover possession of one undivided sixth part of a certain tract of land in New Orleans, which formerly belonged to their said father.

The petition states that the latter having taken part in the war of the Rebellion, and done acts which made him liable to the penalties of the Confiscation Act of July 17, 1862, the said one-sixth part of said land was seized, condemned, and sold under said act, and purchased by one Burbank in May, 1865; that the said A. W. Bosworth died on the 11th day of October, 1885; and that the plaintiffs, upon his death, became the owners in fee-simple of the said one-sixth part of said property, of which the defendant, the Illinois Central Railroad Company, was in possession.

The company filed an answer, setting up various defenses; among other things, tracing title to themselves from the said A. W. Bosworth, by virtue of an act of sale executed by him and his wife, before a notary public, on the 23d day of September, 1871, disposing of all their interest in the premises, with full covenant of warranty. They further allege that said Bosworth had, before said act of sale, not only been included in the general amnesty proclamation of the president, issued on the 25th of December, 1868, but had received a special pardon on the 2d of October, 1865, and had taken the oath of allegiance, and complied with all the terms and conditions

necessary to be restored to, and reinvested with, all the rights, franchises, and privileges of citizenship.

The parties, having waived a trial by jury, submitted to the Court an agreed statement of facts in the nature of a special verdict, upon which the Court gave judgment in favor of the plaintiffs. To that judgment the present writ of error is brought.

Those portions of the statement of facts which are deemed material to the decision of the case are as follows, to-wit—

1st. The plaintiffs, Millard Bosworth and Charles H. Bosworth, are the only surviving legitimate children of Abel Ware Bosworth, who died intestate in the city of New Orleans on the 11th day of October, 1885, and have accepted his succession with benefit of inventory.

2nd. By act before Edward Barnett, notary, on the 25th day of April, 1860, Abel Ware Bosworth purchased from H. W. Palfrey and others a one-third undivided interest in fee-simple title and full ownership in and to the property described in the petition of the plaintiffs in this cause.

3rd. On the breaking out of the war between the States, Abel W. Bosworth entered the Confederate Army, and bore arms against the Government of the United States from about March, 1861, until April, 1865.

4th. Under and by virtue of the Confiscation Act of the United States, approved July 17, 1862, and the joint resolution contemporary therewith, the said property was seized by the proper officer of the United States, and on the 20th day of January, 1865, a libel of information was filed against the said property as the property of A. W. Bosworth, in the District Court of the United States for the Eastern District of Louisiana. Into these proceedings intervened Mrs. Rachel Matilda Bosworth, wife of said Abel Ware Bosworth, to protect her community interests in said property, and, after due proceedings had, the said Court entered a decree of condemnation as to A. W. Bosworth, and a decree in favor of Mrs. Rachel Matilda Bosworth, recognizing her as the owner of one-half of said one-third undivided interest in and to said property. A *venditioni exponas*, in due form of law, issued to the marshal for the sale of said property under said decree, and at said sale "all the right, title, and interest of A. W. Bosworth in and to the one undivided third part of said property" (reserving to Mrs. Rachel M. Bosworth her rights therein, as per order of the Court), was adjudicated on the —— day of the month of May, 1865, to E. W. Burbank, for the price and sum of $1,700, and the marshal executed a deed in due form of law to said Burbank for the same.

6th. That on the 2nd day of October, 1865, Andrew Johnson, President of the United States, granted to said A. W. Bosworth a special pardon, a duly certified copy of which, together with the written acceptance by said Bosworth thereof, is hereto annexed, made part of this statement of facts, and marked "Document A."

7th. That on the 23rd day of September, 1871, by act before Andrew Hero, Jr., notary public, the said A. W. Bosworth and Mrs. Rachel Matilda Bosworth, his wife, sold, assigned, and transferred to Samuel H. Edgar, with full warranty, under the laws of Louisiana, all their right, title, and interest in and to the said property, including the one-sixth undivided interest claimed in this suit by the plaintiffs and

described in the petition, for the price and sum of eleven thousand six hundred and sixty-six two-third dollars.

8th. That on the 18th day December, 1872, the said E. W. Burbank, by act before the same notary, transferred all his right, title, and interest, in the nature of a quitclaim to S. H. Edgar aforesaid, for the price and sum of five thousand one hundred dollars.

9th. That the said S. H. Edgar, by act executed before Charles Nettleton, a duly authorized commissioner for Louisiana, in New York City, on the 10th day of October, 1872, and duly recorded in the office of the Register of Conveyances for the parish for Orleans, on the 30th day of October, 1872, sold and transferred the same property, with full warranty under the laws of Louisiana, unto the New Orleans, Jackson & Great Northern Railroad Company.

10th. That by various transfers made since said date, as set forth in the answers filed in this suit, the said property has come into the possession of the Chicago, St. Louis & New Orleans Railroad Company, who has leased the same to the Illinois Central Railroad Company, which said company holds said property under said lease.

14th. It is further agreed, as a part of this statement of facts, that the President of the United States, on the 25th day of December, 1868, issued a general amnesty proclamation, and the terms of said proclamation, as found in the Statutes at Large of the United States, are made part of this statement of facts.

The following is a copy of the special pardon (Document A) referred to in the statement of facts, and of the written acceptance thereof, to-wit—

"Andrew Johnson, President of the United States of America, to all to whom these presents shall come, greeting:

"Whereas, A. W. Bosworth, of New Orleans, Louisiana, by taking part in the late Rebellion against the Government of the United States, has made himself liable to heavy pains and penalties; and, whereas, the circumstances of his case render him a proper object of executive clemency:

"Now, therefore, be it known that I, Andrew Johnson, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons to me thereunto moving, do hereby grant to the said A. W. Bosworth a full pardon and amnesty for all offenses by him committed, arising from participation, direct or implied, in the said Rebellion, conditioned as follows:

"1st. This pardon to be of no effect until the said A. W. Bosworth shall take the oath prescribed in the proclamation of the President, dated May 29th, 1865.

"2d. To be void and of no effect, if the said A. W. Bosworth shall hereafter at any time acquire any property whatever in slaves, or make use of slave labor.

"3rd. That the said A. W. Bosworth first pay all costs which may have accrued in any proceedings instituted or pending against his person or property before the date of the acceptance of this warrant.

"4th. That the said A. W. Bosworth shall not, by virtue of this warrant, claim any property, or the proceeds of any property, that has been sold by the order, judgment, or decree of a court under the confiscation laws of the United States.

"5th. That the said A. W. Bosworth shall notify the Secretary of State, in writing, that he has received and accepted the foregoing pardon.

"In testimony whereof, I have hereunto signed my name, and caused the seal of the United States to be affixed. Done at the City of Washington this second day of October, A. D. 1865, and of the independence of the United States the ninetieth.

"ANDREW JOHNSON.

"By the President: WILLIAM H. SEWARD,
[Seal.] Secretary of State."

"Washington, D. C., October 5th, 1865.

Honorable William H. Seward, Secretary of State.

"Sir: I have the honor to acknowledge the receipt of the President's warrant of pardon, bearing date October 2nd, 1865, and hereby signify my acceptance of the same, with all the conditions therein specified. I am, sir, your obedient servant,

"A. W. BOSWORTH."

The proclamation of general amnesty and pardon, issued on the 25th day of December, 1868, referred to in the last article of the statement of facts, is found in volume 15, pp. 711, 712, Statutes at Large. After referring to several previous proclamations, it proceeds as follows, to-wit—

"And whereas, the authority of the Federal Government having been re-established in all the States and Territories within the jurisdiction of the United States, it is believed that such prudential reservations and exceptions, as at the dates of said several proclamations were deemed necessary and proper, may now be wisely and justly relinquished, and that a universal amnesty and pardon for participation in said Rebellion extended to all who have borne any part therein, will tend to secure permanent peace, order, and prosperity throughout the land, and to renew and fully restore confidence and fraternal feeling among the whole people, and their respect for and attachment to the National Government, designed by its patriotic founders for the general good.

"Now, therefore, be it known that I, Andrew Johnson, President of the United States, by virtue of the power and authority in me vested by the Constitution, and in the name of the sovereign people of the United States, do hereby proclaim and declare unconditionally, and without reservation, to all and to every person who, directly or indirectly, participated in the late insurrection or Rebellion, a full pardon and amnesty for the offense of treason against the United States, or of adhering to their enemies during the late civil war, with restoration of all rights, privileges, and immunities under the Constitution and the laws which have been made in pursuance thereof."

The principal question raised in the present case, is whether, by the effect of the pardon and amnesty granted to A. W. Bosworth by the special pardon of October, 1865, and the general proclamation of amnesty and pardon of December 25, 1868, he was restored to the control and power of disposition over the fee-simple, or naked property in reversion expectant upon the termination of the confiscated estate in the property

in dispute. The question of the effect of pardon and amnesty on the destination of the remaining estate of the offender, still outstanding after a confiscation of the property during his natural life, has never been settled by this Court. That the guilty party had no control over it, in the absence of such pardon or amnesty, has been frequently decided: *Wallach* v. *Van Riswick* (1875), 92 U. S. 202; *Chaffraix* v. *Shiff* (1875), Id. 214; *Pike* v. *Wassell* (1876), 94 Id. 711; *French* v. *Wade* (1880), 102 Id. 132; and see *Avegno* v. *Schmidt* (1885), 113 Id. 293; *Shields* v. *Sehiff* (1888), 124 Id. 351. But it has been regarded as a doubtful question what became of the fee, or ultimate estate, after the confiscation for life.

"We are not, therefore, called upon," said Justice STRONG, in *Wallach* v. *Van Riswick*, "to determine where the fee dwells during the continuance of the interest of a purchaser at a confiscation sale, whether in the United States, or in the purchaser, subject to be defeated by the death of the offender:" 92 U. S. 212.

It has also been suggested that the fee remained in the person whose estate was confiscated, but without any power in him to dispose of or control it.

Perhaps it is not of much consequence which of these theories, if either of them, is the true one; the important point being that the remnant of the estate, whatever its nature, and wherever it went, was never beneficially disposed of, but remained (so to speak) in a state of suspended animation. Both the common and the civil laws furnish analogies of suspended ownership of estates which may help us to a proper conception of that now under consideration. Blackstone says—

"Sometimes the fee may be in abeyance, that is (as the word signifies) in expectation, remembrance, and contemplation in law, there being no person *in esse* in whom it can vest and abide, though the law considers it as always potentially existing, and ready to vest whenever a proper owner appears. Thus, in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it vest in the heirs of Richard till his death, *nam nemo est hæres viventis;* it remains, therefore, in waiting or abeyance during the life of Richard:" 2 Bl. Comm. 107.

In the civil law, the legal conception is a little different. Pothier says—

"The dominion of property (or ownership), the same as all other rights, as well *in re* as *ad rem*, necessarily supposes a person in whom the right subsists, and to whom it belongs. It need not be a natural person; it may belong to corporations

or communities, which have only a civil and intellectual existence or personality. When an owner dies, and no one will accept the succession, this dormant succession (*successione jacente*) is considered as being a civil person, and as the continuation of that of the deceased; and in this fictitious person subsists the dominion or ownership of whatever belonged to the deceased, the same as all other active and passive rights of the deceased; *hæreditas jacens personæ defuncti locum obtinet*." Droit de Domaine de Propriètè, cc. 1, 15.

But, as already intimated, it is not necessary to be over curious about the intermediate state in which the disembodied shade of naked ownership may have wandered during the period of its ambiguous existence. It is enough to know that it was neither annihilated, nor confiscated, nor appropriated to any third party. The owner, as a punishment for his offenses, was disabled from exercising any acts of ownership over it, and no power to exercise such acts was given to any other person. At his death, if not before, the period of suspension comes to an end, and the estate revives and devolves to his heirs at law.

In *Avegno* v. *Schmidt* (1885), 113 U. S. 293, and in *Shields* v. *Schiff* (1888), 124 Id. 351, this Court held that the heirs of the offender, at his death, take by descent from him, and not by gift or grant from the government. They are not named in the confiscation act, it is true, nor in the joint resolution limiting its operation. The latter merely says—

"Nor shall any punishment or proceedings under said act, be so construed as to work a forfeiture of the real estate of the offender, beyond his natural life."

The Court has construed the effect of this language to be, to leave the property free to descend to the heirs of the guilty party: *Bigelow* v. *Forrest* (1870), 9 Wall. (76 U.S.) 339; *Wallach* v. *Van Riswick* (1875), 92 U. S. 202, 210. Mr. Justice STRONG in the latter case, speaking of the constitutional provision that no attainder of treason should work corruption of blood or forfeiture, except during the life of the person attainted (which provision was the ground and cause for passing the joint resolution referred to), said—

"No one ever doubted that it was a provision introduced for the benefit of the children and heirs alone,—a declaration that the children should not bear the iniquity of the fathers."

But although the effect of the law was to hold the estate, or naked ownership, in a state of suspension for the benefit of the

heirs, yet they acquired no vested interest in it; for, until the death of the ancestor, there is no heir. During his life it does not appear who the heirs will be. Heirs apparent have, in a special case, been received to intervene for the protection of the property from spoliation: *Pike* v. *Wassell* (1880), 94 U. S. 711. This was allowed from the necessity of the case, arising from the fact that the ancestor's disability prevented him from exercising any power over the property for its protection or otherwise, and no other persons but the heirs apparent had even a contingent interest to be protected.

It would seem to follow, as a logical consequence from the decision in *Avegno* v. *Schmidt* and *Shields* v. *Schiff*, that after the confiscation of the property, the naked fee (or the naked ownership, as denominated in the civil law), subject, for the life-time of the offender, to the interest or usufruct of the purchaser at the confiscation sale, remained in the offender himself; otherwise, how could his heirs take it from him by inheritance? But by reason of his disability to dispose of or touch it, or affect it in any manner whatsoever, it remained as before stated, a mere dead estate, or in a condition of suspended animation. We think that this is, on the whole, the most reasonable view. There is no corruption of blood. The offender can transmit by descent; his heirs take from him by descent. Why, then, is it not most rational to conclude that the dormant and suspended fee has continued in him?

Now, if the disabilities which prevented such person from exercising any power over this suspended fee, or naked property, be removed by a pardon or amnesty,—so removed as to restore him to all his rights, privileges, and immunities, as if he had never offended, except as to those things which have become vested in other persons,—why does it not restore him to the control of his property so far as the same has never been forfeited, or has never become vested in another person? In our judgment, it does restore him to such control. In the opinion of the Court in the case of *Ex parte Garland* (1867), 4 Wall. (71 U. S.) 333, 380, the effect of a pardon is stated as follows, to wit—

"A pardon reaches both the punishment prescribed for the offense, and the guilt of the offender; and, when the pardon is full, it releases the punishment and blots

out of existence the guilt, so that in the eye of the law, the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity. There is only this limitation to its operation,—it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment."

The qualification in the last sentence of this extract, that a pardon does not affect vested interests, was exemplified in the case of *Semmes* v. *U. S.* (1875), 91 U. S. 21, where a pardon was held not to interfere with the right of a purchaser of the forfeited estate. The same doctrine had been laid down in the *Confiscation Cases* (1874), 20 Wall. (87 U. S.) 92, 112, 113. It was distinctly repeated and explained in *Knote* v. *U. S.* (1877), 95 U. S. 149. In that case, property of the claimant had been seized by the authorities of the United States, on the ground of treason and rebellion; a decree of condemnation and forfeiture had been passed, the property sold, and the proceeds paid into the Treasury. The Court decided that subsequent pardon and amnesty did not have the effect of restoring to the offender the right to these proceeds. They had become absolutely vested in the United States, and could not be devested by the pardon. The effect of a pardon was so fully discussed in that case, that an extract from the opinion of the Court will not be out of place here. The Court say—

"A pardon is an act of grace, by which an offender is released from the consequences of his offense, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offense, and restores to him all his civil rights. In contemplation of law, it so far blots out the offense that afterwards it cannot be imputed to him, to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitaties him to that extent in his former position. But it does not make amends for the past. It affords no relief for what has been suffered by the offender, in his person by imprisonment, forced labor, or otherwise. It does not give compensation for what has been done or suffered, nor does it impose upon the Government any obligation to give it. The offense being established by judicial proceedings, that which has been done or suffered while they were in force, is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required. Neither does the pardon affect any rights which have vested in others directly by the execution of the judgment for the offense, or which have been acquired by others while that judgment was in force. If, for example, by the judgment, a sale of the offender's property has

been had, the purchaser will hold the property notwithstanding the subsequent pardon. And if the proceeds of the sale have been paid to a party to whom the law has assigned them, they cannot be subsequently reached and recovered by the offender. * * * So, also, if the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress. * * * Where, however, property condemned, or its proceeds, have not thus vested, but remain under control of the executive, or of officers subject to his orders, or are in the custody of the judicial tribunals, the property will be restored or its proceeds delivered to the original owner, upon his full pardon."

The last portion of the above extract was justified by the decision in the case of *Armstrong's Foundry* (1868), 6 Wall. (73 U. S.) 766, where a pardon was received by Armstrong, after his foundry had been seized, and while proceedings were pending for its confiscation. He was even allowed to plead the full pardon as new matter in this Court, while the case was pending an appeal; and the Court held, and decided, that this pardon relieved him of so much of the penalty as accrued to the United States, without any expression of opinion as to the rights of the informer.

The citations now made, are sufficient to show the true bearing and effect of the pardon granted to Bosworth, and of the general proclamation of amnesty as applied to him. The property in question had never vested in any person, when these acts of grace were performed. It had not even been forfeited. Nothing but the life-interest had been forfeited. His power to enjoy or dispose of it, was simply suspended by his disability as an offender against the Government of the United States. This disability was a part of his punishment. It seems to be perfectly clear, therefore, in the light of the authorities referred to, that when his guilt and the punishment therefor were expunged by his pardon this disability was removed. In being restored to all his rights, privileges, and immunities, he was restored to the control of so much of his property and estate as had not become vested either in the Government or in any other person; especially that part or quality of his estate which had never been forfeited, namely, the naked residuary ownership of the property, subject to the usufruct of the purchaser under the confiscation proceedings.

This result, however, does not depend upon the hypothesis that the dead fee remained in Bosworth after the confiscation

proceedings took place. It is equally attained if we suppose that the fee was *in nubibus*, or that it devolved to the Government for the benefit of whom it might concern. We are not trammeled by any technical rule of the common or the civil law on the subject. The statute, and the inferences derivable therefrom, make the law that controls it. Regarding the substance of things, and not their form, the truth is simply this: A portion of the estate, limited in time, was forfeited. The residue, expectant upon the expiration of that time, remained untouched,—undisposed of; out of the owner's power and control, it is true, but not subject to any other person's power or control. It was somewhere, or possibly nowhere. But if it had not an actual, it had a potential existence, ready to devolve to the heirs of the owner upon his death, or to be revived by any other cause that should call it into renewed vitality or enjoyment. The removal of the guilty party's disabilities, restoration of all his rights, powers and privileges, not absolutely lost or vested in another, was such a cause. Those disabilities were all that stood in the way of his control and disposition of the naked ownership of the property. Being removed, it necessarily follows that he was restored to that control and power of disposition.

It follows, from these views, that the act of sale executed by A. W. Bosworth and his wife in September, 1871, was effectual to transfer and convey the property in dispute, and that the judgment of the Circuit Court in favor of the plaintiffs below (the defendants in error) was erroneous. That judgment is therefore reversed and the cause remanded, with instructions to enter judgment for the defendants below, the now plaintiffs in error.

BLATCHFORD, J., did not sit in this case, or take any part in its decision.

The statement of facts in the opinion shows that the proceedings against A. W. Bosworth's property were civil proceedings, *in rem*, against it as enemy property under the Act of July 17, 1862 (12 Stat. at Large 589). The opinion, however, treats them as criminal proceedings, *in personam*, against Bosworth himself (father of the defendants in error), for the crime of treason or rebellion; repeatedly speaks of him as an "offender," and of the civil confiscation as a "punishment;" and it concludes that the personal pardon of the condemned offender operates the restoration to him of the fee simple of his real

estate from whatever effect the *actio in rem* had had upon it.

In *Bigelow* v. *Forrest* (1870), 9 Wall. (76 U. S.) 339, proceedings *in rem*, under the act, were first treated as *in personam;* the civil action against enemy property, as a criminal one to punish for treason; and it was held that the children of French Forrest could recover after his death, because "the punishment inflicted upon him, is not to descend to his children;" because "the forfeiture of the land of the offender was * * * without any corruption of his heritable blood," etc.

Mc Veigh v. *United States* (1871), 11 Wall. (78 U. S.) 259, is the next important case, growing out of a confiscation proceeding *in rem*, in which the Supreme Court took a similar view of the condemnation of enemy property under the act. They treated the proceedings as though they had been a personal criminal trial of McVeigh himself, and discussed his "criminality," "guilt," "offenses," etc., though he had not been indicted, arrested, or tried in that civil case against his property as enemy property, which the act authorized.

In *Miller* v. *United States* (1871), 11 Wall. (78 U. S.) 292, the Supreme Court took the opposite view of proceedings under the act. They held that, though the first four sections of the statute related to personal criminal proceedings for treason, the second four, under which the confiscation was decreed, were confined to civil proceedings *in rem*, against enemy property only, under the law of nations. The *res* was personal property, in the proceedings which the Court was reviewing; but in the closely following case of *Tyler* v. *Defrees* (1871), 11 Wall. (78 U. S.) 331, which was concerning land as the *res*, the Court took the same view, and said of the Confiscation Act of 1862, which it was expounding, that it was "designed to introduce the principle of confiscating enemy property, seized on land, like that seized on water." And further: The Constitution imposes "no restriction upon the power to prosecute war, or confiscate enemy's property." Mr. Justice FIELD (with whom CLIFFORD and DAVIS, JJ., then concurred, though the last assented to the judgment in the *Tyler* case) dissented in both these cases, and contended that the proceeding was personal, criminal and unconstitutional, because it was not preceded by indictment and arrest. The majority of the court, basing the proceedings on the confiscation sections of the act only, left the joint resolution, explanatory, out of consideration, since that was expressly confined to "forfeiture" as a "punishment" of the "offender," confining it to his "natural life" in nearly the same terms used in the Constitution relative to personal trials for the crime of treason.

Brown v. *Kennedy* (1873), 15 Wall. (82 U. S.) 591, is substantially in accord with the two foregoing decisions, and there was no dissent, except that of FIELD, J.

In the next case, *Day* v. *Micou* (1874), 18 Wall. (85 U. S.) 160, which involved the confiscation case of *U. S.* v. *Two Squares of Ground* [in the U. S. District Court at New Orleans, where certain land of Judah P. Benjamin was condemned], the Court discussed the question, "What was the *res?*" in that proceeding, and held that the fee of the land had not been condemned, and allowed a mortgagee, who had been defaulted for non-appearance in that proceeding, to foreclose after condemnation. The answer of the Court to its own question, deduced from the decision, was that the land, *minus* the lien upon it, was the *res*.

The next cases, *U. S.* v. *Slidell's Land*, and *U. S.* v. *Conrad's Lots*, called by the reporter, "*The Confiscation Cases*" (1874), 20 Wall. (87 U. S.) 92–117, were against the theory that the pro-

ceedings under the act were personal and criminal. The Court held, in these, that "the liability of property" was the only subject of inquiry; that "no judgment was possible against any person;" that "the enactment of Congress was that the *property* belonging to any one embraced within several classes of persons, should be subject to seizure and condemnation;" that "persons were referred to *only to identify the property*;" that "reference to ownership was the mode selected for designating that which was made liable to confiscation;" that "everything necessary to a common law [sic] proceeding *in rem*, is found in the record;" that it was not necessary "to conclude against the statute" because that form is "inapplicable to civil proceedings."

There was nothing in these decisions in accord with *Ill. Cent. R. R. Co.* v. *Bosworth*—nothing favoring the doctrine that the proceedings *in rem* were *in personam*, and nothing in common with *Day* v. *Micou* (1874), 18 Wall. (85 U. S.) 160, except the *dictum* that intervention should not have been allowed, the Supreme Court overlooking, for the moment, that just such interventions were expressly authorized by statute. (U. S. Rev. Stat., § 5322; Act of March 3, 1863, 12 Stat. 762.)

As to the question of the fee, the Court said that by the decree of confiscation, "the United States succeeded to the position of Slidell, whatever that was;" that is, if he had held the fee before the confiscation (which he had), the United States held it afterwards. And in the very next confiscation case, *Semmes* v. *United States* (1875), 91 U. S. 21, the Court said: "Properties condemned as forfeited to the United States, under the aforesaid Act of Congress [that of July 17, 1862, under which all the cases were brought, as well as the one under review], become the property of the United States from the date of the decree of condemnation: 12 Stat. 591, Sec. 7. Judgment of forfeiture was rendered in this case on the 5th of April, 1865, and the *land* in question became, from that date, the property of the United States; * * * the *title to the land was lost to him* [Semmes] when it became *vested in the United States.* * * Beyond doubt, the original decree of the District Court was complete and correct. * * * Such proceedings, under the Confiscation Act in question, are justified as an exercise of belligerent rights against a public enemy, and *are not, in their nature, a punishment for treason.* Consequently, confiscation being a proceeding distinct from, and independent of, the treasonable guilt of the owner of the confiscated property, *pardon for treason will not restore rights to property previously condemned* and sold in the exercise of belligerent rights, as against a purchaser in good faith and for value." The Supreme Court were unanimous in this decision, and these quoted utterances, and the cases of *Miller* v. *U. S.* and *The Confiscation Cases*, *supra*, were cited and relied upon. Respecting intervention, they said the intervener "would have been remediless had he not reconvened."

But *Osborn* v. *United States* (1875), 91 U. S. 474, on the subject of pardon, antagonizes the case of *Semmes*, though both are in the same volume. Admitting that "the confiscation law of 1862 is construed to apply only to public enemies," the Court said, in close proximity (though not in close logical connection), that Osborn's pardon covered "the *offenses* for which the forfeiture of his property was decreed." (p. 477.) * * * "The pardon of that *offense* necessarily carried with it the release of the *penalty* attached to its commission. It is of the very essence of a pardon that it releases the *offender* from the consequence of his *offense*." And there are other like expressions. (Opinion by

FIELD, J.) How could one be constitutionally convicted and punished without information or indictment, personal arrest, trial by jury, etc., as he had contended could not be done, when dissenting in the *Miller* and *Tyler* cases, *supra?*

Next comes *Wallach* v. *Van Riswick* (1875), 92 U. S. 202, in which it was held that all the "estate and property" of Wallach was condemned as "enemy property," nothing was left in him. "It is incredible that Congress, while providing for the confiscation of an enemy's *land*, intended to leave in that enemy *a vested interest* therein, etc. The description [in the act] of property thus made liable to seizure, is as broad as possible. It covers the estate of the owner, all his estate or ownership. No authority is given to seize less than the whole." And the Court quote from the act, that the property seized "shall be condemned as enemies' property and become the property of the United States," adding: "Nothing can be plainer than that condemnation *and sale* of the identical property seized, was intended by Congress, and it was expressly declared that the seizure ordered should be of all the estate and property of the persons designated in the act."

This case was much like the one under review. Van Riswick had acquired the title of Wallach, as well as that of the United States—just as the plaintiffs in error, in the present case, have done. But the Court held that Wallach had nothing to convey, and that his "heirs" could take (by inheritance?) after his death, notwithstanding his deed to Van Riswick. For, though holding, on the one hand, that the confiscation proceedings were civil, *in rem*, against enemy *property*, not any person, the Court held, on the other, that the Joint Resolution Explanatory was applicable to the proceedings as criminal, *in personam*, against Wallach himself and not against his property. As to the fee, they now expressly declined to say whether it had been in the United States or the purchaser, after confiscation. Therefore, between the dates of decree and sale, it must have been in the United States, according to this deliverance. Nothing was said about its possibly being in abeyance, or *in nubibus*, as in the present case. But the Court certainly held, in the *Wallach* case, that the fee was out of him, by the confiscation. That case was briefly re-affirmed in *Chaffraix* v. *Shiff* (1875), 92 U. S. 214.

Passing *Windsor* v. *McVeigh* (1876), 93 U. S. 274, and *Gregory* v. *McVeigh* (1876), Id. 284, which followed the criminal theory, and held (contrary to established international law), that an enemy has judicial standing in a court while yet fighting to destroy it, we come to *Pike* v. *Wassel* (1876), 94 U. S. 711, confessedly modeled on the *Wallach* case. The Court said that the confiscation of Pike's land, "without any doubt, *vested it in the United States, or the purchaser*," at the Government sale; and that Pike's creditors could not make their money out of any property right left in Pike to that land. The reason given in the *Wallach* case, that if the fee had been left in the enemy, he might yet use it to further rebellion against the Government, was inapplicable to the position of creditors who sought to make their money. If the fee was *in nubibus*, that circumstance would weigh against the innocent creditors, presumably loyal, and in favor of the enemy debtor. Hiding one's effects *in the clouds* to defeat attachment, is something novel. If the land itself had not been confiscated, but only an uncertain, precarious usufruct, as the Court now say, why should it not have remained liable to execution for Pike's debts immediately, with reservation of the usufructuary right? The "abeyance," which the Court recognizes

in the case under review, would have saved Bosworth from his creditors till he got his pardon, and left him exposed to them afterwards.

Knote v. *United States* (1877), 95 U. S. 149: The effect of pardon, as to the proceeds of confiscated property covered into the treasury, was the point of this decision; and it was held that the pardoned enemy could not recover it, though the criminal theory was reavowed.

In *Burbank* v. *Conrad* (1877), 96 U. S. 291, the theory that the confiscation proceedings *in rem* were criminal proceedings *in personam*, prevailed; and the Court departed from the rule in *The Confiscation Cases*, *Slidell's Land* and *Conrad's Lots*, *supra*, and now held that the naming of the enemy owner in the libel, is not merely to describe the property proceeded against, but to make him a party; and that if the *res* belonged to another, the latter would not be "remediless," should he fail to intervene, as had been held unanimously in the *Semmes* case. But in *Burbank* v. *Semmes* (1878), 99 U. S. 138 (the next case on the subject), the opposite theory prevails; the Court follow the statute; the proceedings are held to have been civil, against property, etc.

French v. *Wade* (1880), 102 U. S. 132, was almost precisely like the case now under review. Wade's land was confiscated and sold, and French acquired the Government's title, and also bought whatever right remained in Wade—just as the Railroad Co. bought both titles in the Bosworth land. The facts of these two cases, and *Wallach* v. *Van Riswick*, run together on all fours. The Court said: "By the condemnation and sale, Wade's estate was separated entirely from that of his heirs after his death, and the heirs are not estopped, by his warranty, from asserting their title."

I do not know what that means. *Nemo plus commodi heredi suo relinquet quam ipse habuit.*

The Court said: "As to him, the forfeiture was complete and absolute; but the ownership after his death was in no wise affected, except by placing it beyond his control while living." If "the forfeiture was complete and absolute," how could Wade, holding the price of the fee in his pocket, yet have the fee simple title stored away in the clouds, to be brought down to him at death, or on being pardoned for a personal crime? And if the "forfeiture was complete," etc., how can the heirs take from him "by inheritance," as the Court said they did, in this very case? If, "as to him," the forfeiture was complete, as to everybody else it must have been so, since it is conceded that he had held the fee, and no other rights appear in any one else.

In *Kirk* v. *Lynd* (1882), 106 U. S. 315, where the condemnation was under the Act of 1861 (12 Stat. at Large 319), the Court distinguished between that Act, and the Act of 1862 (12 Stat. at Large 589), and held that the fee had been confiscated because the property had been *used* for hostile purposes, while under the latter Act, property is proceeded against because of its having the enemy character, and therefore it was concluded that the object was to *punish* the enemy as an offender. The proceedings under both confiscation statutes were *in rem*, as both required: but the Court did not see that the Government's *jus in re* arises from the enemy character of property, as clearly as from the hostile use of property. Examples may be given in prize proceedings *in rem*. A professedly neutral ship, caught *in delicto*—running a blockade for instance—is condemned for hostility done by a thing, while a ship captured in mid ocean, may be condemned, if an enemy vessel, though nothing hostile has been done in, with, or by it. This principle

was recognized in *Semmes* v. *U. S. supra*, and other cases above noticed. This oversight of the Supreme Court, as to the *jus in re*, was the pebble that turned the stream of decisions the wrong way, and caused the Court to treat civil proceedings as criminal; proceedings *in rem* as *in personam;* confiscation of enemy property under the law of nations limited by statute, as a prosecution for the punishment of an offender, whether citizen or alien. This is all virtually acknowledged by the Court in *Kirk* v. *Lynd.*

In *Avegno* v. *Schmidt* (1885), 113 U. S. 293, and *Shields* v. *Schiff* (1888), 124 Id. 351, the Court followed the *Wallach, Pike* and *French* cases, and held that nothing was left in the former enemy owner (or "offender," as their theory has it), which he could convey by deed, will, or in any way, with no reference to the effect of their previously received pardons for treason. They held, under the authority of *Day* v. *Micou*, and *Marcuard's Intervention*, that the default of a mortgagee, and final judgment as *res adjudicata* (*quoad omnes*) was of no effect—contrary to *Semmes* v. *U. S.* on the same point, as well as in the teeth of the statute above cited.

In this last case, *Ill. Cent. R. R. Co.* v. *Bosworth's Heirs*, the criminal theory is reiterated; some twenty different times the Court applies criminal terms to Bosworth, (though he may have been an alien not capable of treason, so far as the record shows) and to the civil proceedings against his property (charged in the libel as enemy property,) such terms as "offenders," "offense," "conviction," "punishment," "pardon," etc., etc., are repeatedly employed; but the point of the decision is that the fee of confiscated property, under the Act of 1862, is in abeyance till the "offender" (the bereft enemy), be dead or pardoned, when it becomes vested in him or his heirs, *eo instanti.*

General pardon was granted to all who had committed the crimes of treason and rebellion, by proclamation in 1868, which is printed in the opinion: why then could not all living persons, who had had lands confiscated under the Act of 1862, immediately have power to sell or devise the fee, subject to the life usufruct awarded by the Supreme Court to the purchaser? Why, from that date, could not creditors attach the interest of such a person for debt, in a suit against him?

It is well settled that pardon is personal and does not affect property forfeited as a fictitiously guilty thing, or confiscated as a fictitiously hostile thing, by proceedings *in rem*—against *it.* The Supreme Court, to take Bosworth's land out of the general rule, had to treat the four confiscation sections of the Act of 1862, as providing for the conviction of traitors without indictment, arrest, jury or any personal trial, in order to make the Joint Resolution apply. But *quere?* Are we now to understand that the constitutional provision, requiring a personal trial for treason, is abrogated? It would seem that the questions touching the whereabouts of the fee simple of confiscated property, are themselves *in nubibus.* It is clear enough, however, that the Court was right in reversing the decision below, for the railroad company, which bought the property from Edgar, who had bought of Burbank, (the purchaser of the property at the confiscation sale), had acquired the ownership of it: *Miller* v. *U. S.* (1871), 11 Wall. (78 U. S.) 292; *Tyler* v. *Defrees* (1871), Id. 331; *Semmes* v. *U. S.* (1875), 91 U. S. 21; *Confiscation Cases* (1874), 20 Wall. (86 U. S.) 92; all of which (the Court still cites with approval,) sustain confiscation.

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